

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The parties agreed claimant suffered a compensable injury to his left shoulder. Dr. Robert L. Eyster was authorized to provide medical treatment for that injury. Ultimately, treatment for the left shoulder injury included a referral for physical therapy and work hardening.

Claimant described the work hardening sessions which included lifting weights, stretching, push-ups, carrying boxes with concrete in them and walking up and down stairs while holding the boxes in a designated position to strengthen the shoulder. The physical therapy, in addition to working on claimant's left shoulder, included activities directed at claimant's legs which he described as pushing weights, squatting, bending, stretching and jogging. Claimant noted that the sessions would last from four to five hours a day.

After his physical therapy session on July 3, 2002, claimant noted his right leg was hurting and he concluded he had strained or pulled something. No therapy was scheduled the following day. On July 5, 2002, the claimant called and canceled his physical therapy noting he had a severe headache. By Sunday, July 7, 2002, claimant's leg was causing such pain that claimant sought medical care at the emergency room at Via Christi Regional Medical Center. Claimant was examined, provided medications and released to follow up with his physician.

The contemporaneous medical records dated July 7, 2002, from Via Christi, contain a history of an onset of right leg pain a month ago with no known injury. Another note in the records indicates an onset three weeks ago. Claimant denied he gave such history at the emergency room. At his July 8, 2002, therapy session claimant noted his visit to the emergency room and then performed his therapy regime. At claimant's visit to Dr. Eyster on July 12, 2002, he complained of right leg pain. The doctor's note indicates it was not a work-related injury. But claimant explained he told the doctor it was not work-related because by that time he had been advised respondent would not provide treatment for the injury.

Initially, it should be noted that any aggravation or injury to claimant's leg that he experienced during physical therapy and work hardening would also be compensable as it resulted from treatment of his work-related injury.¹

Respondent argues claimant's contemporaneous comments at the emergency room as well as the notation in Dr. Eyster's record that the leg pain was not work-related establish claimant did not suffer a leg injury during physical therapy and work hardening. However, this ignores claimant's testimony denying he gave such a history to the emergency room personnel as well as his testimony that he told Dr. Eyster the leg pain was not work-related because that was what respondent had told him. Moreover, claimant denied any other injuries to his right leg.

¹ See *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353, 995 P.2d 855 (2000).

The Judge had the opportunity to observe claimant testify and, therefore, the opportunity to assess his demeanor. Despite the conflicting evidence contained in the emergency room records regarding the onset of claimant's leg pain, the Judge found claimant's testimony persuasive, as noted in the Order granting claimant's request for benefits. Considering the record compiled to date, the Board agrees with the Judge's analysis of the evidence.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.²

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 17, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2002.

BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation

² K.S.A. 44-534a(a)(2).